



UNITED STATES DEPARTMENT *of* JUSTICE

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# Fees and Fee Waivers



## General Information Sources of Guidance

- Office of Management and Budget  
Contact: (202) 395-6466
- Office of Information Policy  
Department of Justice  
Contact: FOIA Hotline (202) 514-3642



## General Information Sources of Guidance

- OMB's Uniform Freedom of Information Act Fee Schedule and Guidelines (March 27, 1987)
- Agency Regulations
- Department of Justice Guide to the Freedom of Information Act (2009 ed.)



## *Three Types of Fees*

### *Search*

All time spent searching for and retrieving records or information responsive to a request.



## *Three Types of Fees*

### *Review*

All that is necessary to review the material to determine if it can be released, and all that is necessary to prepare its release.



## *Three Types of Fees*

### *Duplication*

The per-page cost of the materials to be released to the requester.



## *Three Categories of Requesters*

### *Commercial-Use*

Information that furthers commercial, trade, or profit interests.



## *Three Categories of Requesters*

### *“Favored”*

- Educational institutions
- Non-commercial scientific institutions
- Representatives of the news media





## *Three Categories of Requesters*

### *All Other*

All requesters who are not Commercial Use or “Favored”



## *Who Pays What?*

	<u>Search</u>	<u>Review</u>	<u>Dup.</u>
Commercial Use	Yes	Yes	Yes
“Favored”	No	No	Yes*
All Others	Yes**	No	Yes*

\* “Favored” and All Others requesters receive the first 100 pages of duplication free of charge per request.

\*\* All Others requesters receive the first two hours of search free of charge per request.



## *Fee Assessment Considerations*

Agreement to pay fees up to \$25  
unless fee waiver sought.



# *Fee Assessment Considerations*

## *Statutory Fee Restrictions*

Except for Commercial Use requesters, agencies must provide the first 100 pages and the first two hours of search time without cost to the requester.



# *Fee Assessment Considerations*

## *Limits on Charging Search Fees*

- Agencies are prohibited from charging certain fees if they do not meet the response time.
- The FOIA prohibits agencies from assessing search fees (or duplication fees if requester is an educational or non-commercial, scientific institution, or representative of the news media) if the agency fails to meet the 20-day response time limit, unless unusual or exceptional circumstances apply to the processing of the request.



# *Fee Assessment Considerations*

## *Limits on Charging Search Fees*

### *Exceptions to the Rule*

- If either “unusual” or “exceptional” circumstances apply to the processing of the request, the exceptions to the rule apply and agencies can assess fees as they have normally done.
- The pre-existing definitions of “unusual” and “exceptional” circumstances apply to this search fee rule.



# *Fee Assessment Considerations*

## *Limits on Charging Search Fees*

### *Exceptions to the Rule*

“Unusual Circumstances” exist in three situations:

- When there is a need to search for and collect records from separate offices;
- When there is a need to search for, collect, and examine a voluminous amount of records; or
- When there is a need for consultations with another agency or among two or more components within the same agency.



# *Fee Assessment Considerations*

## *Limits on Charging Search Fees*

### *Exceptions to the Rule*

“Exceptional Circumstances”:

- The FOIA states that exceptional circumstances cannot include a “delay that results from a predictable workload of requests . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.”
- In other words, exceptional circumstances exist if the agency has a backlog of pending requests and is making reasonable progress in reducing that backlog.





## *Fee Assessment Considerations*

### *Agency Threshold*

No charge when total fees are below the agency's cost to process the check.



# *Fee Assessment Considerations*

## *Aggregation*

When component reasonably believes a requester is attempting to divide a request to avoid fees.



## *Fee Assessment Considerations*

### *Prepayment*

In cases where requester agreed to pay fees up to a certain amount, the agency can require payment upon completion of the processing but before actual delivery of the records to the requester.



## *Fee Assessment Considerations*

### *Advance Payment*

- Fee estimate exceeds \$250; or
- Requester has previously failed to timely pay a properly assessed fee



## *Fee Assessment Considerations*

### Interest on Unpaid Bills



## *Fee Assessment Consideration*

Other charges for “special” services  
done at the discretion of the agency



## *Fee Waivers*

# *General & Procedural Considerations*

### *Preliminary Questions*

- Responsive records?
- Assessable fees?
- Fee waiver requested?



## *Fee Waivers*

### *General & Procedural Considerations*

- Timing for making determination
- Case by Case determination
- Importance of Administrative Record





## *Fee Waivers*

### *General & Procedural Considerations*

- Tolling for insufficient information
- Releasable information
- Indigence



## *Fee Waivers*

### *General & Procedural Considerations*

- Appeal Rights
- Burden of Proof
- Standard of Review



## *Fee Waivers – The Standard*

Documents shall be furnished without any charge or at reduced rate . . . If disclosure of the information is in the public interest because it is [2] likely to contribute [4] significantly to [3] public understanding of the [1] operations or activities of the government and is not [6] primarily in the [5] commercial interest of the requester.



## *Fee Waivers – The Standard*

- “Public Interest” Requirement
  - Factors 1-4
  
- Measurement of the Commercial Interest:
  - Factors 5 & 6



## *Fee Waivers*

### *The Public Interest Requirement*

- Factor 1:
  - Does the subject matter of the request concern the operations or activities of the federal government?



## *Fee Waivers*

### *The Public Interest Requirement*

- Factor 2:
  - Are the records likely to contribute to the understanding of the subject of the request?



## *Fee Waivers*

### *The Public Interest Requirement*

- Factor 3:
  - Will the records contribute to public understanding?



## *Fee Waivers*

### *The Public Interest Requirement*

➤ Factor 4:

- Will the contribution to public understanding be significant?





## *Fee Waivers*

### *Measurement of Commercial Interest*

- Factor 5:
  - Does the requester have a commercial interest in the records, i.e., one that furthers its profit, trade, or business motive?



## *Fee Waivers*

### *Measurement of Commercial Interest*

- Factor 6:
  - Which is greater, the identified public interest or the identified commercial interest?  
(balancing test)